UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WAUSAU UNDERWRITERS INSURANCE COMPANY, a foreign corporation; and EMPLOYERS INSURANCE COMPANY OF WAUSAU, a foreign corporation,

Plaintiffs,

v.

CONTINENTAL CASUALTY COMPANY, a foreign corporation; COLMAC COIL MANUFACTURING, INC., a Washington corporation; and C&S WHOLESALE GROCERS, INC., a foreign corporation,

Defendants.

NO. CV-07-0056-EFS

ORDER GRANTING MARSH'S MOTION TO DISMISS AND MOTION TO STRIKE

COLMAC COIL MANUFACTURING, INC., a Washington corporation,

Counterclaimants and Third-Party Plaintiff,

v.

WAUSAU UNDERWRITERS INSURANCE COMPANY, a foreign corporation; and EMPLOYERS INSURANCE COMPANY OF WAUSAU, a foreign corporation,

Counterclaim Defendants,

and

SEABURY & SMITH, INC., a foreign corporation d/b/a MARSH ADVANTAGE AMERICA/SEABURY & SMITH, INC.

Third-Party Defendants.

A hearing occurred in the above-captioned matter on October 30, 2007, in Richland, Washington. Kenneth C. Apicella appeared telephonically on behalf of Continental Casualty Company; Jeffrey L. Supinger appeared on behalf of Colmac Coil Manufacturing, Inc. ("Colmac"); and James T. McDermott appeared on behalf of Seabury & Smith Inc. ("Marsh"). Before the Court were Marsh's Motion to Dismiss (Ct. Rec. 29) and Motion to Strike and Refuse to Consider (Ct. Rec. 44). After reviewing the submitted material, relevant authority, and hearing oral argument, the Court is fully informed and grants both motions. The reasons for the Court's Order are set forth below.

I. Background

The following facts are set forth in a light most favorable to Colmac:

Colmac manufactures cooling equipment for industrial applications. Colmac's main customers are in the food processing or food warehousing business.

Marsh has served as Colmac's insurance broker for several years. Marsh knew that approximately forty-percent (40%) of Colmac's cooling systems utilize ammonia as the refrigerant.

Colmac's insurance policy through The Hartford contained a "Pollution Exclusion," but the exclusion covered ammonia leaks. In the summer of 2004, The Hartford indicated it no longer wished to insure Colmac.

On July 9, 2004, Marsh's designated broker, Thomas Blue, met with Colmac to review its insurance needs. Mr. Blue was advised that Colmac's cooling systems utilize ammonia. Mr. Blue later provided Colmac with an insurance summary from Wausau. The summary appeared identical to Colmac's prior policy with The Hartford.

In June 2004, Colmac sold two commercial cooling units to Gartner Refrigeration to install in C&S Wholesale Grocer's ("C&S") warehouse facility in Hawaii. C&S later sued Colmac, alleging one of its cooling units malfunctioned by releasing ammonia into C&S's warehouse and damaging over a quarter of a million boxes of stored frozen food.

Colmac subsequently filed a claim with Wausau. While Wausau is currently defending Colmac in the Hawaii lawsuit in accordance with Colmac's policy, it has done so under a reservation of rights, seeking

declaratory relief in this Court that Colmac's Wausau policy contains a Total Pollution Exclusion that does not cover ammonia leaks.

Colmac's answer to Wausau's complaint for declaratory relief contains a third-party complaint against Marsh for negligence, breach of contract, and breach of fiduciary duty. Colmac's third-party claims are contingent upon whether or not Wausau prevails in the declaratory judgment action.

II. Discussion

A. Marsh's Motion to Dismiss (Ct. Rec. 29)

1. Rule 12(b)(1) Subject Matter Jurisdiction

Marsh argues that Colmac fails to state "a case or controversy" within this Court's subject-matter jurisdiction because Colmac's alleged claims against Marsh are contingent upon this Court determining Colmac's policy did not provide coverage for ammonia leaks. (Ct. Rec. 30 at 5.) Colmac responds that this Court has subject-matter jurisdiction over Marsh in the unique procedural posture of the declaratory judgment context. (Ct. Rec. 51 at 3.)[1]

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[1]Colmac initially argued its Third-Party Complaint alleged an actual controversy under the Declaratory Judgment Act. (Ct. Rec. 36 at 9.) Marsh insists Colmac's reliance on declaratory judgment standards and case law is improper because its Third-Party Complaint does not seek declaratory relief. In its supplemental brief, Colmac states that it never pled a claim for declaratory relief; rather, it just insisted the Court has subject matter jurisdiction in the unique procedural posture of the declaratory judgment context. Not so. Colmac's original

i. Rule 12(b)(1) Standard

Federal Rule of Civil Procedure 12(b)(1) provides that a complaint may be dismissed for "lack of jurisdiction over the subject matter." FED. R. CIV. P. 12(b)(1). "When subject matter jurisdiction is challenged under Federal Rule of Civil Procedure 12(b)(1), plaintiff has the burden of proving jurisdiction in order to survive the motion." *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001). A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect can be corrected by an amendment. *Id.*

On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989). Consideration of materials outside the pleadings does not convert a 12(b)(1) motion into one for

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memorandum belies its amended position because it unequivocally stated that it alleged an actual controversy under the Declaratory Judgment Act. *Id.* Nevertheless, the distinction between standards is largely irrelevant when examining standing and ripeness because the Constitution does not require less of litigants simply because their claim is framed as an action for declaratory judgment. *See Calderon v. Ashmus*, 523 U.S. 740, 746 (1998).

summary judgment. *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983).

ii. Standing and Ripeness Standard

Article III of the Constitution limits the federal court's judicial power to "cases" and "controversies." Federal courts are presumed to lack jurisdiction "unless the contrary appears affirmatively from the record." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986).

Standing is a threshold requirement in every federal case. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The three components of Article III standing are: (1) a distinct and palpable injury to the plaintiff; (2) a fairly traceable causal connection between the injury and challenged conduct; and (3) a substantial likelihood that the relief requested will prevent or redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Covington v. Jefferson County*, 358 F.3d 626, 637-38 (9th Cir. 2004).

Ripeness often "coincides squarely with standing's injury in fact prong," *Thomas v. Anchorage Equal Right Com'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc), and in "measuring whether a litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing." *Id.* at 1139 (citations omitted). Accordingly, Marsh's assertions that Colmac's claims are hypothetical and contingent will be addressed in the Court's ripeness inquiry.

"[T]he ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and may never

occur, from those cases that are appropriate for federal court action." ERWIN CHEMERINSKY, FEDERAL JURISDICTION 117 (Vicki Been et al. eds., 5th ed. 2007) (citing *Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967). As the Ninth Circuit has observed, the court's "role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Thomas*, 220 F.3d at 1138.

"The point at which an issue becomes sufficiently concrete and real to constitute a case or controversy as opposed to an abstract or hypothetical situation can be more a matter of intuition and reason than a rigid application of a definitive standard." MOORE'S FEDERAL PRACTICE - CIVIL § 101.75 (2007). The Supreme Court has described the line of demarcation as follows:

> The difference between an abstract question and a controversy . . . is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality.

Maryland Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941). "If the facts are uncertain and the court is being asked to make a legal ruling based on the possibility that certain facts will be found to exist and some point in the future, then a decision would constitute nothing more than an advisory opinion based on a hypothetical scenario." MOORE'S - CIVIL § 101.75.

Here, Colmac's claims against Marsh are entirely contingent and hypothetical. As Marsh correctly points out, Colmac's own pleadings pursue contingent relief: Colmac's Third-Party Complaint seeks "[a]ll damages caused to Colmac by Marsh's negligence, breach of contract, and breach of fiduciary duty, *in the event Wausau's exclusion is valid*" (Ct. Rec. 19 at 16) (emphasis added); Colmac's Memorandum in Opposition states that, "should the [C]ourt rule in Wausau's favor, Colmac would face real injury." (Ct. Rec. 36 at 10.)

In fact, Colmac has suffered no injury from Marsh's alleged failure to obtain adequate insurance coverage because Wausau, Colmac's insurance provider, has not breached either its duty to defend (Wausau is paying for Colmac's defense costs in the underlying Hawaii lawsuit, albeit under a reservation of rights) or its duty to indemnify (Colmac's liability in the underlying Hawaii lawsuit is still undecided).

Colmac's argument that it has incurred damages in the form of attorney fees and costs defending against Wausau's declaratory judgment action is not persuasive because, should Colmac prevail (meaning Wausau has a duty to defend and indemnify Colmac in the Hawaii litigation), then Colmac is entitled to recover its attorney fees and costs. *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52 (1991). Accordingly, Colmac's perceived damages in the form of attorney fees and costs are also contingent and hypothetical. Colmac's Third-Party Complaint asks the Court to issue an advisory opinion based on a hypothetical scenario. This issue is not ripe.

2. Rule 12(b)(6) Failure to State a Claim

Marsh argues a dismissal for failure to state a claim is appropriate because Colmac's claims against Marsh for negligence, breach of contract, and breach of fiduciary duty all require that Colmac plead actual, recoverable damages - and there are none. (Ct. Rec. 30 at 11.) Colmac responds that a special relationship existed between Marsh and Colmac and Marsh's acts make it liable for Colmac's attorney fees and costs incurred in defending the declaratory judgment action. (Ct. Rec. 51 at 10.)

Here, it is not necessary for the Court to address Marsh's Rule 12(b)(6) argument because, as stated, the matter is not ripe.

3. Rule 14(a) Improper Joinder

Marsh asserts that Colmac improperly joined it as a third-party defendant under Rule 14(a) because Colmac's third-party claim is not derivatively based on Wausau's original claim. (Ct. Rec. 30 at 16.) Colmac responds that joinder of an insurance agent by its insured party is proper in declaratory judgment actions where the insurance carrier seeks a determination of non-coverage. (Ct. Rec. 36 at 12.)

Federal Rule of Civil Procedure 14(a) provides for service of a third-party complaint "upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claims against the third-party plaintiff." *U.S. v. One 1977 Mercedes Benz*, 708 F.2d 444, 452 (9th Cir. 1983). The decision to allow a third-party defendant to be impleaded under Rule 14 is entrusted to the sound discretion of the trial court. *Id.*

The parties assert two competing perspectives on Rule 14 impleader. The first is a policy-oriented perspective adopted by the Fifth Circuit

in *American Fidelity & Casualty Co. v. Greyhound Corp.*, 232 F.2d 89 (5th Cir. 1956) and followed in *Old Republic Insurance Co. v. Concast, Inc.*, 99 F.R.D. 566, 569 (S.D.N.Y. 1983).

In *Old Republic*, the court examined a conceptually similar declaratory judgment action where the third-party defendant claimed it was impermissibly joined under Rule 14(a). 99 F.R.D. at 568. That court noted that, in declaratory judgment actions, strictly interpreting Rule 14(a) makes it logically impossible for defendants to maintain third-party complaints because determining that a plaintiff/insurance company's policy does not cover defendant/insured does not create a claim against defendant/third-party plaintiff for which third-party defendant could be liable in all or in part. *Id.*

The court declined to follow such a narrow interpretation, stating Rule 14's policy is to facilitate judicial economy and avoid multiple and circuitous suits. *Id.* (citations omitted). Both *American Fidelity* and *Old Republic* focused on the factual similarities between the main claim and the third-party action to determine whether Rule 14 permitted impleader.

The second competing perspective is the narrow approach adopted in *One 1977 Mercedes Benz*, where the Ninth Circuit set forth the requirements for Rule 14(a) impleader:

> [A] third-party claim may be asserted only when the third party's liability is in some way dependant on the outcome of the main claim and the third party's liability is secondary or derivative. It is not sufficient that the third-party claim is a related claim; the claim must be derivatively based on the original plaintiff's claim.

708 F.2d. at 452; *see also United States v. Hutchins*, 47 F.R.D. 340, 341 ("Rule 14 is a 'procedural mechanism.' It is available only if the third-party defendant is or may be liable to the third-party plaintiff for the main claim as a matter of substantive law."). This narrow perspective is applied in a similar insurance context in *United States Fire Insurance Co. v. Reading Municipal Airport Authority*, 130 F.R.D. 38 (E.D. Pa. 1990). There, the district court adopted Rule 14(a)'s narrow interpretation and concluded joining the third-party defendant insurance broker was impermissible. *Id.* at 39.

Here, it is not necessary for the Court to decide Marsh's 14(a) argument because, as stated, the issue is not ripe. The Court nevertheless notes in passing that Colmac's negligence, breach of contract, and breach of fiduciary duty claims are related to but not derivative of Wausau's declaratory judgment action against Colmac. The fact that the claims asserted in the Complaint for Declaratory Relief and the Third-Party Complaint are inextricably intertwined does not satisfy the Ninth Circuit's narrow impleader requirements set forth in *One 1977 Mercedes Benz*.

B. Marsh's Motion to Strike and Refuse to Consider (Ct. Rec. 44)

Marsh asserts that Colmac improperly submitted three affidavits, over 350 pages of exhibits, and a statement of facts[2] in opposition to

[2] As Marsh correctly states, it appears Colmac, by submitting a "Statement of Facts" in opposition to Marsh's 12(b)(6) motion to dismiss, has confused a motion to dismiss with a motion for summary judgment. *See* L.R. 56.1(b).

its Rule 12(b)(6) motion to dismiss because the Court, in Rule 12(b)(6) actions, is limited to reviewing the complaint's contents. (Ct. Rec. 46 at 2.) Colmac responds that its submitted material can be reviewed by the Court because the documents' authenticity is not challenged and they are referred to in the complaint. (Ct. Rec. 53 at 4.)

In deciding a motion to dismiss for failure to state a claim, the court's review is generally limited to the complaint's contents. *Campanelli v. Brockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996). The court must accept all factual allegations pled in the complaint as true, and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The Court may also consider material which is properly submitted as part of the complaint:

> [A] document is not "outside" the complaint if the complaint specifically refers to the document and if its authenticity is not questioned . . . . When [the] plaintiff fails to introduce a pertinent document as part of the pleading, [the] defendant may introduce the exhibit as part of his motion attacking the pleading . . . . Documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.

Cooper v. Pickett, 137 F.3d 616, 622-23 (9th Cir. 1997), *superseded on other grounds by statute*, Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. §§ 78u-4(b)(1) & (2), *as recognized in Fischer v. Vantive Corp.*, 283 F.3d 1079 (9th Cir. 2002); *see also Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (finding that a court may consider evidence on which the complaint 'necessarily relies' if: (1) the

complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion).

Here, it is Colmac, not Marsh, seeking to submit supplemental material referenced in the Third-Party Complaint. This is opposite of the factual scenario in *Cooper*, where it was the defendant who urged the court to consider documents referenced in the complaint to support dismissal. Colmac does cite *Fields v. Legacy Health System*, 413 F.3d 943 (9th Cir. 2005) to support its argument, but this case also contains a defendant urging the court to consider documents referenced in the complaint to support dismissal. Colmac cites no authority demonstrating that the Court can or should consider a plaintiff's subsequently submitted material. Moreover, Marsh does challenge the authenticity of the supplemental material, noting multiple instances where discrepancies exist. (Ct. Rec. 55 at 5.)

The Court finds that striking Colmac's supplemental material is appropriate. As case law plainly indicates, the Court's review is generally limited to the complaint's contents. Considering supplemental material referenced in the complaint is the exception, not the rule, and this exception applies to defendants, not plaintiffs. And given that Marsh does challenge supplemental documents' authenticity, Colmac cannot and should not be allowed to submit documentation to supplement its own complaint. If its complaint is deficient, the proper action is to move the Court to amend.

Accordingly, **IT IS HEREBY ORDERED:**

1. Marsh's Motion to Dismiss **(Ct. Rec. 29)** is **GRANTED.**

2. Marsh's Motion for Expedited Hearing **(Ct. Rec. 49)** is **GRANTED.**

3. Marsh's Motion to Strike and Refuse to Consider **(Ct. Rec. 44)** is **GRANTED.**

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and to provide copies to all counsel.

DATED this 24th day of March 2008.

S/ Edward F. Shea
EDWARD F. SHEA
United States District Judge

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